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C O N F I D E N T I A L SECTION 01 OF 03 KYIV 004290

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SUBJECT: UKRAINE: THE LONG ROAD TO REFORMING CONSTITUTIONAL
REFORM

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Classified By: Political Counselor Kent Logsdon for reasons 1.4(a,b,d).

11. (SBU) Summary. Constitutional reform bill 4180 (now known by its Ministry of Justice number 2222) shifting powers from the President to the Prime Minister-led Cabinet of Ministers and Rada majority was adopted December 8, 2004 as part of the package to solve the political crisis ensuing from the Orange Revolution and to allow a revote to elect Yushchenko president (reftel). Haste and the need to paper over disagreements, however, left the political reforms vague and poorly written and thus open to potential Constitutional Court challenge. Eight months after the new political system went into effect (formally January 1, 2006, but in reality after the March 26 elections), the Prime Minister, President, and Rada are trying to feel their way through, and at times to take advantage of, the vagueness to de facto and de jure redefine political reform in their favor. Eventually the Constitutional Court, a government body that gets little attention and which lacked a quorum from November 2005-August 2006, may be called on to play a pivotal role in the power struggle by reviewing some or all of the changes from December 2004. Court experts and politicians involved in the drafting have stated repeatedly that, if asked and in the absence of political pressure, the Court would likely rule to overturn political reform in part or in whole. The decision to initiate a potential review is thus a political one, still being mulled separately by Tymoshenko's Bloc (BYuT) and Our Ukraine, and likely to be fiercely resisted by the parties in the ruling coalition, Regions, Communists, and especially the Socialists led by Rada Speaker Moroz, who championed political reform for nearly a decade. End Summary.

Constitutional ABCs

12. (SBU) The Constitutional Court sits outside the rest of the judicial branch structure as an independent court that hears only questions related to interpreting the 1996 constitution. It is comprised of 18 judges--6 appointed each by the President, the Rada, and the Congress of Judges. The Court sat without 14 judges for ten months from November 2005-August 2006 after political forces fearing an attempt to overturn political reform refused to swear in judges nominated by President Yushchenko and the Congress of Judges in October 2005. As part of the early August agreement to sign the Universal and for Yushchenko to nominate Yanukovych as Prime Minister, the Rada took action to nominate its own candidates and approve all judges.

13. (SBU) According to constitutional court experts, the Court has two fundamental weaknesses. Private citizens cannot petition the court--only the Rada, President, and the Cabinet of Ministers can (all three have permanent representatives to the Constitutional Court who petition on behalf of their organization). Secondly, the Court has jurisdiction only

over the Rada, President, CabMin, and Crimean Parliament, but no jurisdiction over lower courts or local and regional governments, limiting its ability to rule on all constitutional issues.

¶4. (SBU) There are two ways to amend the constitution. A constitutional reform draft can be approved by a two-thirds majority in the Rada and then be held subject to a referendum. Or a simple majority (226 MPs) in the Rada can approve the reform draft in one Rada session and then a two-thirds vote (300 MPs) must approve the reform in the following Rada session. Both versions require that the Constitutional Court read the draft amendments before they are voted on and that the Court-approved text be the version of reform that goes forward.

Reversing Reform is Technically Possible....

¶5. (SBU) We spoke with two Constitutional Court experts, former Court Judge Petro Martynenko and former senior court clerk Stanislav Shevchuk, November 3 about the possible annulment of political reform. Both stated that constitutional reform could be undone on a number of grounds if the Court took up this matter. They agreed that when the constitutional reforms were adopted there were both violations of Rada procedure and of the procedures for amendment embodied in the constitution itself. Several of the political authors of the December 2004 political compromise, including former Rada Speaker Lytvyn and former SDPU(o) MP Nestor Shufrych, have acknowledged that violations in the way the reform was adopted are grounds for the Court to overturn the reform. (Shufrych told us in September that he warned Moroz, who is a longtime champion of political

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reform to reduce the powers of the President, of this danger the morning of December 8, 2004, prior to passage of the changes).

--Since there were approximately 15 changes made in the reform draft after the Court okayed it, it should have been reviewed a second time by the Court, which it was not.

--The constitutional reform was voted on in a package vote along with the new presidential election law, which violates Rada rules of procedure.

--If constitutional amendments are voted on and fail in the Rada, the Rada must wait a year before reconsidering the issue. A bill on political reform that was basically 4180 but submitted under a different number was voted on and rejected in April 2004, so it should not have been eligible for a vote in December of the same year.

....But Politically Questionable

¶6. (SBU) Judge Martynenko argued that the real issue was not a question of a constitutional basis for undoing reform, but whether there was a political one. Given that the reforms had already been implemented and the new system was functioning, would reversing the reforms simply cause chaos? If the Court did vote to annul the reform, it would have to provide very specific recommendations on how to transition back to the old system and decide what would happen to the Yanukovych government. In his opinion, it would be more pragmatic to rework the current system than to undo it. Then you could gather popular support by holding a referendum to end the political debate.

The Orange Team: Slow to Challenge Status Quo

¶7. (SBU) There is no statute of limitations on making a request for a court review, and thus far, no one has asked

the Court to review the constitutional reform package. Yuliya Tymoshenko gathered the signatures of 45 MPs (note: the minimum number required for the Rada to petition the Court) over a year ago to ask the Court to cancel reform, but did not submit it to the Court. She has since said periodically both publicly and privately that BYuT still plans to make an appeal. Most recently, she told AS Fried on November 16 that she hoped the Constitutional Court might overturn the reforms in the spring (septel).

¶8. (SBU) In past weeks, Our Ukraine members have begun calling for amending constitutional reform, with a formal decision taken in this regard at the party congress on November 11. On November 8, Yushchenko's then representative to the Rada, Yuriy Kluchkovskiy, said that constitutional reform should be annulled because the Yanukovych government was taking advantage of it to gain authoritarian powers. One of Our Ukraine's leaders, Petro Poroshenko, also said publicly that the reforms needed to be revisited. At a November 8 briefing on the activities of the National Commission on Rule of Law, Yushchenko decided that the commission's top priority for next year should be constitutional reform, although he did not specify what kind of actions he would like to see.

The Coalition is Fighting Review

¶9. (C) On August 4, Regions pushed through in a single reading a controversial amendment to the law on the Constitutional Court barring the Court from reviewing already-existing constitutional reform, which the Rada passed and Yushchenko immediately signed. Shevchuk and Martynenko opined that Regions wrote the law because there were concerns that the new Court judges might be pro-Yushchenko and because they are aware that legal grounds exist that could result in an overturning of the constitutional changes. Martynenko and Tymoshenko told us that approximately 2/3 of the judges lean towards Yushchenko and might reverse some or all of the constitutional reforms if asked.

¶10. (C) On November 7, Speaker Moroz claimed to Ambassador that political reform would not be undone. He suggested that the coalition will eventually have 300 deputies, probably by year's end, which will protect the reforms already passed and allow the Rada to introduce new reforms. He believed that one reason for the collapse of the coalition talks with Our Ukraine was Yushchenko's unwillingness to pass a second constitutional reform bill, 3207, that was introduced in the December 2004 compromise and is still pending. This bill

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would transfer power in the regions from
presidentially-appointed governors to regional assemblies.

¶11. (SBU) Note: Interestingly, the experts we talked to said that in contrast to 4180 (which moved power from the president to the PM), this second constitutional reform bill, 3207, is perfectly constitutional. It received a simple majority vote in the previous Rada session, so if it receives two-thirds Rada approval (300 votes) by the end of this Rada session (January 12, 2007), then it will go forward regardless of whether or not the Constitutional Court moves to reverse some or all of the reforms in 4180.

¶12. (C) Moroz thought there was a fifty-fifty chance that the Constitutional Court would review political reform, but he did not believe the Court was independent, because the current group of justices were appointed under certain political conditions. Moroz warned that if constitutional reform was reversed, it would lead to civil conflict. He also said that he believed this was a problem not with the President, but with his circle of advisers, who are trying to convince him to reclaim Kuchma's powers.

Testing the Waters with an Untested Court?

¶13. (C) Yushchenko has sent two petitions to the court to interpret and clarify certain aspects of the reform, perhaps as trial-runs on how the Court will rule. The first was whether the Cabinet had the right to name the head of the state arms broker, UkrSpetsExport, in the past always a presidential nomination. The press reported in early November that it could be at least six months before the Court ruled. The second concerned defining the powers of the Minister of Internal Affairs and to whom he would report. Similarly, Tymoshenko told AS Fried in November that she was taking several smaller issue to the Court before trying to tackle constitutional reform as a whole. First, she had petitioned the Court to rule on imperial mandate--making Rada seats property of the factions, not the MPs, so that she can remove defectors and keep her faction strength intact. Later, she planned to ask the Court to declare the formation of the Yanukovych government invalid due to its formation after the constitutionally-mandated time frame.

¶14. (SBU) Both Martynenko and Shevchuk assessed the new complement of Constitutional Court judges, especially the Yushchenko appointees, as very professional, and Shevchuk praised new Chief Judge Dumbrovsky. (Note: He was the President of the Civil Chamber of the Supreme Court when the court annulled the second round of the 2004 presidential election.) Martynenko added that while said some of the new judges were law professors, on the whole there were not enough constitutional experts on the court.

Dueling Constitutional Commissions?

¶15. (SBU) On November 2, Yushchenko established a constitutional commission, whose main functions are creating a system of checks and balances, as declared in the Universal, and drafting proposals for further constitutional amendments. Yushchenko said that the Prime Minister, Rada Speaker, and Rada faction heads were all invited to nominate members of this commission, although there has been no announcement yet of any nominations. On the same day, however, Moroz presented a draft resolution to the Rada to form its own constitutional commission to analyze bills touching on constitutional reform. This commission would be headed by First Deputy Speaker Martynuk and would include constitutional law specialists from all factions. The Rada voted to postpone a decision on Moroz's proposal. Either commission could be used to deconflict competing versions of key legislation written to define the new political system, such as the two laws on the Cabinet of Ministers. Alternatively, the institutional jousting in evidence in the wake of implementation of political reform could continue in competing efforts to shape further steps and review efforts to date.

¶16. (U) Visit Embassy Kyiv's classified website:
www.state.gov/p/eur/kiev.
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